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No. 93-908

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1993

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CHARLES J. REICH,
*Petitioner,*

v.

MARCUS E. COLLINS and
THE GEORGIA DEPARTMENT OF REVENUE,
*Respondents.*

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**On Writ of Certiorari to the Supreme Court of Georgia**

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## BRIEF FOR PETITIONER

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CARLTON M. HENSON
*Counsel of Record*
MCALPIN & HENSON
Eleven Piedmont Center
Suite 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774

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## QUESTION PRESENTED

Whether Georgia provided a clear and certain remedy to federal retirees who paid state income taxes that were illegal under the doctrine of intergovernmental immunity.

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### OPINIONS BELOW

The December 2, 1993 opinion of the Supreme Court of Georgia ("*Reich II*") (Pet. App. A) is reported at 263 Ga. 602, 437 S.E.2d 320. This Court's order remanding this matter to the Supreme Court of Georgia (No. 92-1276, June 28, 1993, Pet. App. B) is reported at 509 U.S. ——, 113 S. Ct. 3028. The prior decision of the Supreme Court of Georgia, November 19, 1992, (*Reich I*) (Pet. App. D) and the order denying petitioner's Motion for Reconsideration at that time (Pet. App. C) are reported at 262 Ga. 625, 422 S.E.2d 846.

## JURISDICTION

The decision of the Georgia Supreme Court denying relief to Petitioner for unconstitutional and illegal taxation was issued December 2, 1993. The Petition for Certiorari was filed on December 8, 1993 and granted on February 22, 1994. 114 S. Ct. 1048. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**U.S. Const. art. VI § 2**

* * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

**U.S. Const. amend. XIV § 1**

* * * *

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**State Statutes**

In addition to those reproduced herein, the text of relevant statutes can be found in the Appendix to the Petition for Writ of Certiorari and the Appendix to the Brief *Amicus Curiae* on Behalf of the Military Coalition in Support of Petitioner.

## STATEMENT OF THE CASE

Petitioner, Charles J. Reich, is retired from the United States Army. Col. Reich served for 20 years, including a combat tour in Vietnam. He retired in 1978, and from



1978 through 1988 paid Georgia income tax on his federal retirement benefits.

Beginning in 1931, Georgia provided state income tax exemption for all federal and state retirees. 1931 Ga. Laws 24. These blanket exemptions were subsequently repealed for both groups, and Georgia began creating patchwork exemptions for classes of state retirees. For example, Georgia provided a tax exemption for retired teachers in 1943, employees under the state retirement system in 1949, and superior court clerks in 1968. 1943 Ga. Laws 668; 1949 Ga. Laws 160; and 1968 Ga. Laws 381. These efforts culminated in 1980, when Georgia consolidated these exemptions under one statute and provided that virtually all retirement benefits paid by the state were exempt from state income taxation. O.C.G.A. § 48-7-27 (1982 & Supp. 1993) (former Georgia Code Ann. § 91-A-3607).

No exemption was provided for federal retirees in the 1980 amendment, and federal retirees protested this unequal treatment. In 1981, 1982, and 1983, bills were introduced in the Georgia House of Representatives to provide an exemption for federal retirees. (Reich Dep., Exs. 18-23). These bills were not successful.

In February 1985, a group of federal retirees in Augusta, Georgia filed a class action in United States District Court challenging Georgia's taxing scheme and seeking refunds. The retirees asserted the tax on federal retirement benefits violated 4 U.S.C. § 111 and the constitutional doctrines of intergovernmental immunity and equal protection. The Eleventh Circuit dismissed the retirees' action on jurisdictional grounds holding that the state provided remedies that were plain, speedy and efficient under the Tax Injunction Act, 28 U.S.C. § 1341. *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986).[1]

[1] The remedies noted by the Eleventh Circuit were the refund statute and superior court review based on assessment appeal, an affidavit of illegality to execution, and appeal under Georgia's

During the 1980's, Georgia collected approximately $40 to $50 million per year in illegal taxes from federal retirees. (Thomassen Dep., p. 7, 13, Ex. 3, 4). Further, from 1985 through June 30, 1989, Georgia accumulated a revenue surplus in the amount of $193.4 million. (Thomassen Dep., pp. 23-25).[2]

On ~~March~~ 28, 1989, this Court issued *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), which held illegal a Michigan tax scheme virtually identical to Georgia's.

Despite *Davis*, Georgia announced on April 8 that taxes on federal retirement income would still be due under state law on April 19, 1989. Further, the director of the Georgia Revenue Department's Income Tax Division "recommend[ed] pensioners file state income tax Form 500-X by April 17." (Thomassen Dep., Ex. 2). Form 500-X is Georgia's amended return form, and it was the form designated by the Revenue Department for filing refund claims after *Davis*.[3]

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Administrative Procedure Act. *Waldron*, 788 F.2d at 738. Since then, the Georgia Supreme Court has held that the refund statute does not apply to federal retirees with claims based on *Davis*. *See Reich v. Collins I*, 262 Ga. 625, 422 S.E.2d 846 (1992), *vacated and remanded*, 509 U.S. ——, 113 S. Ct. 3028 (1993). The inadequacy of superior court review under *McKesson* is discussed at pp. 25-26 below.

[2] The State projects that the accumulated revenue surplus will exceed $200 million by June 1994. "Miller Tax Plan Hailed as Good Political Move But Advocates For State Programs Had Hoped For Funding Increases," *The Atlanta Constitution*, Dec. 18, 1993, § B at 1.

[3] O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993) provides:

> A taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, whether paid voluntarily or involuntarily, and shall be refunded interest on the amount of the taxes or fees at the rate of 9 percent per annum from the date of payment of the tax or fee to the commissioner. Refunds shall be drawn from the treasury on warrants of the Governor issued upon itemized requisitions showing in each instance the person to whom the refund is to be made, the amount of the refund, and the reason for the refund.



In view of *Davis*, though, many federal retirees refused to pay the income tax due on April 17, 1989 for tax year 1988. Col. Reich was among those who refused to pay the remaining tax owed for 1988.

On March 30, 1989, Petitioner delivered a letter to the Revenue Department explaining that he was not paying the tax based on *Davis* and demanding refunds for 1978-1988. (Reich Dep., Ex. 25). On April 12, 1989, in accordance with the Department's April 8 announcement, Petitioner filed amended returns requesting refunds for 1980-1988. (Reich Dep., Ex. 26). Finally, with two other retirees, *pro se*, he filed a suit for declaratory and equitable relief on April 14.

The State responded by issuing assessment notices for the remaining 1988 tax to Col. Reich and other retirees including both penalties and interest. (Reich Dep., Exs. 27 and 29). (J.A. 10, 23). Petitioner has not paid this remaining 1988 tax, and to this day, the State has not rescinded or otherwise withdrawn its claims for penalties and interest.

In addition to the suit filed by Petitioner, two other suits were filed before April 17, 1989 seeking relief from the illegal and unconstitutional taxation. These suits represented the independent efforts of three groups of retirees seeking to find a remedy. All three suits were dismissed, at least in part, because of the existence of Georgia's refund statute, O.C.G.A. § 48-2-35.

In *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989),[4] the plaintiffs filed a class action seeking declaratory relief and equitable relief in the form of an escrow

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[4] Sgt. James Waldron was also the lead plaintiff in *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986) referenced on p. 8 above.

fund for the accumulation of taxes paid after *Davis*. Although the plaintiffs were initially successful, the Georgia Supreme Court issued a supersedeas stay of the escrow order.

Between the time of this stay and the Court's decision in October 1989, the Georgia legislature met in a special session. In September, the Legislature repealed the exemption for state retirees, but only for tax years after 1988. The legislative amendment did not address the taxes that were collected after *Davis* for tax year 1988 or provide any relief for the illegal taxation imposed on retirees before 1989.

On full consideration in *Collins v. Waldron*, the Georgia Supreme Court dismissed the action as moot in view of the legislature's repeal of the offending statute. With regard to the escrow fund for taxes collected after *Davis*, the Court ruled that "the refund statute (O.C.G.A. § 48-2-35) provides an adequate remedy for any vestigial disparity." 259 Ga. at 582, 385 S.E.2d at 75 n.1.

After the Georgia Supreme Court's decision in *Collins v. Waldron*, Col. Reich's suit for declaratory and equitable relief was dismissed by the trial court because he and his co-plaintiffs had not followed the procedural requirements of O.C.G.A. § 48-2-35. *Salter, Reich and Neal v. Georgia, et al.*, Fulton Superior Court, State of Georgia, Civil Action File No. D-71448 (Order of Mar. 27, 1990). (J.A. 31).

The third case, *Wetzel v. Collins*, Case No. 1:89-CV-758-ODE, was filed in the United States District Court for the Northern District of Georgia on April 14, 1989.[5] As in *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986), this case was dismissed on jurisdictional grounds pursuant to the Tax Injunction Act, 28 U.S.C. § 1341. The trial court held that Georgia's remedial scheme, including O.C.G.A. § 48-2-35 (the refund statute), provided a plain, speedy and efficient remedy. *Wetzel v. Collins*, United States District Court, Northern District of Georgia, Case No. 1:89-CV-758-ODE; Order of Sept. 26, 1990. This holding was affirmed by the Eleventh Circuit. (Case No. 90-9023, judgment of Aug. 23, 1991).[6]

[5] Counsels of record in this case were the respective attorneys for plaintiffs and defendants in *Wetzel*.



In April 1990, after the declaratory suit brought by Col. Reich and two others was dismissed, and once he became eligible under the refund statute to file suit,[7] Col. Reich initiated this action challenging Georgia's tax scheme and seeking refunds of illegally collected taxes based on the principles set forth in *Davis* and the Fifth and Fourteenth Amendments to the U.S. Constitution. This case "has proceeded as the 'test case' for the identical claims of approximately 50,000 federal retirees" seeking relief in the wake of *Davis*. ([Commissioner's] Response to Application for Discretionary Appeal, Jan. 16, 1992, p. 4).[8]

[6] In both *Waldron v. Collins*, 788 F.2d 736 (11th Cir. 1986) and *Wetzel v. Collins* (11th Cir. No. 90-9023), the Commissioner represented to the Eleventh Circuit that the refund statute was an available remedy for federal retirees.

[7] The refund statute requires claimants to file a claim with the Commissioner and wait for a denial or for a period of one year before filing suit. O.C.G.A. § 48-2-35(b)(1) (1991 & Supp. 1993). A denial was issued to Col. Reich by letter of January 23, 1990. (Reich Dep., Ex. 30). Col. Reich was the first retiree, and only one of a handful, who received a denial. Most claimants received no response to their claims. For retirees who did not receive notices of denials and who were awaiting the results of pending lawsuits in Georgia, the Attorney General has advised a few of them in writing that (1) the Department of Revenue takes the position that the statute of limitations on bringing suit does not begin to run until the Department of Revenue actually denies the refund claim, and (2) a final decision in any of the pending cases would automatically apply to each taxpayer similarly situated regardless of whether that person had filed his own lawsuit.

[8] Approximately 50,000 Georgia retirees filed refund claims under the refund statute. (Thomassen Dep., Ex. 5). The Department of

The trial court below found that the Georgia tax scheme was unconstitutional and illegal under *Davis*. The trial court also held that the refund statute, O.C.G.A. § 48-2-35, was applicable and barred claims for refunds before 1985. The trial court concluded that no refunds were due, though, because *Davis* could not be applied retroactively based on *Chevron Oil v. Huson*, 404 U.S. 97 (1971). (Pet. App. 1E).

On appeal, the Georgia Supreme Court held that *Davis* must be applied retroactively. Nevertheless, the Georgia Court held that Col. Reich was not entitled to any relief, holding, for the first time that Georgia's refund statute "does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid." *Reich v. Collins I*, 262 Ga. 625, 628, 422 S.E.2d 846, 849 (1992).

The Court also took "this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last." Neither of these holdings were supported by citations of authority.[9]

Petitioner filed a motion for reconsideration pointing out that this decision violated federal due process as set forth in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). This motion was denied by order of December 17, 1992. (Pet. App. C).

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Revenue reports that the principal amount of these claims filed for 1985-1988 is $62,747,287.

[9] The newfound protest requirement was particularly unfair because it squarely contradicted two separate Georgia statutes. O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993) (the refund statute) provides for refunds whether the taxes were paid "voluntarily or involuntarily." O.C.G.A. § 13-1-13 (1982) codifies the voluntary payment doctrine as it exists in Georgia and provides that, "Filing a protest at the time of payment does not change the rule prescribed in this Code Section."



Petitioner then filed a petition for writ of certiorari to this Court. On June 28, 1993, the petition was granted, the Georgia Court's November 19, 1992 decision was vacated, and the case was remanded for "further consideration in light of *Harper v. Virginia Dep't of Taxation*, 509 U.S. ——, 113 S. Ct. 2510 (1993)." *Reich v. Collins*, 509 U.S. ——, 113 S. Ct. 3028 (1993).

On remand, the Georgia Supreme Court concluded in a 5-2 decision that, "there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax." *Reich v. Collins II*, 263 Ga. 602, 604, 437 S.E.2d 320, 322 (1993). The Georgia Court concluded that Petitioner was not entitled to any relief.

## ARGUMENT SUMMARY

Georgia did not provide its federal retiree taxpayers a clear and certain predeprivation remedy because Georgia imposed various sanctions and summary remedies designed to prompt retirees to pay their income taxes before their objections were heard. These sanctions included the risk of criminal prosecution, a fine of 25%, interest at 12%, garnishment, levy and attachment.

Even if these sanctions and summary remedies are not considered, the purported predeprivation remedies found to exist by the Georgia Supreme Court are individually unclear and uncertain. Declaratory judgment was not available to federal retirees because of the State's sovereign immunity and because Georgia's refund statute provided an available and adequate alternative remedy at law. Equitable relief was not available because O.C.G.A. § 48-7-84 (1982) bars injunctions against income taxes, and because the refund statute was an adequate remedy at law.

Administrative review and superior court review were uncertain because they depended upon the Revenue Department to issue an assessment or take other action. This could take a substantial period of time, and there was

no assurance that it would occur. Further, administrative jurisdiction for constitutional challenges does not exist in Georgia, and superior court review imposes the additional burden of a bond or other security equal to the tax.

Finally, Georgia's overall remedial scheme was unclear and uncertain because Georgia provided a clear and certain predeprivation remedy in the refund statute, but Georgia later eliminated this remedy after the time for other relief had expired.

## ARGUMENT AND CITATION OF AUTHORITY

### I. GEORGIA DID NOT PROVIDE FEDERAL RETIREES A CLEAR AND CERTAIN REMEDY THAT WAS FREE OF DURESS.

Georgia must provide meaningful backward looking relief or a predeprivation remedy free of duress for taxpayers, including federal retirees, challenging an illegal, unconstitutional tax. *Harper*, 509 U.S. at ——, 113 S. Ct. at 2519-2520, *citing McKesson*, 496 U.S. at 31, 36-40. Without duress means that the predeprivation procedure must be free of sanctions and summary remedies designed to "prompt" or to "encourage" taxpayers to tender tax payments before their objections are entertained and resolved. *Harper*, 509 U.S. at ——, 113 S. Ct. at 2520 n.10, *citing McKesson*, 496 U.S. at 38. All of the procedures offered by the State subject the taxpayer to various sanctions and summary remedies and thus require the State to provide meaningful backward looking relief. *Id.*, *citing McKesson*, 496 U.S. at 31. Further, as discussed below, pp. 17-29, the purported predeprivation remedies suggested by the State are neither clear nor certain.

The remedies proposed by the Georgia Supreme Court require a taxpayer to break the law and then argue that the statute is facially unconstitutional, all in the face of severe penalties should the argument fail. None of the procedures suggested by the State shield the taxpayer from these sanctions.



#### A. Georgia Law Imposes Sanctions and Summary Remedies Designed to Prompt the Payment of Income Tax When Due.

##### 1. *Criminal prosecution.*

Georgia imposes criminal sanctions for taxpayers who fail to make payment of income taxes when due. Mere nonpayment of a tax when due is punishable as a misdemeanor under O.C.G.A. § 48-7-2 (1982).[10] There is no requirement of willfulness under this statute.

In *State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985), the Georgia Supreme Court addressed the issue of willfulness under this statute and concluded that "Section 48-7-2(a)(1) is unconstitutional on state law grounds to the extent it authorizes imprisonment for mere nonpayment of income taxes." 254 Ga. at 90, 326 S.E.2d at 730.

The Court, though, did not declare the entire statute unconstitutional, and the Court's focus on imprisonments left standing the alternative punishment of a criminal fine in the amount of $1,000 under O.C.G.A. § 17-10-3 (1990

[10] O.C.G.A. § 48-7-2 (1982). Failure of person to pay tax, file return, keep records, etc., under this chapter; penalty.

(a) It shall be unlawful for any person who is required under this chapter to pay any tax, make any return, keep any records, supply any information, or exhibit any books or records for the purpose of computation, assessment, or collection of any tax imposed by this chapter to fail to:

(1) Pay the tax;

(2) Make the return;

(3) Keep the records; or

(4) When requested to do so by the commissioner:

(A) Supply the information; or

(B) Exhibit the books or records.

(b) In addition to other penalties provided by law, any person who violated subsection (a) of this Code section shall be guilty of a misdemeanor.

& Supp. 1993). Because they refused to pay 1988 income taxes after *Davis*, Petitioner and other retirees face the risk of criminal prosecution, the stigma and record of a conviction, and a fine of $1,000 for each nonpayment.

Where willfulness is present, a Georgia taxpayer may be imprisoned for a misdemeanor under O.C.G.A. § 48-7-127(c) (1982 & Supp. 1993).[11] Similar to the federal income tax scheme, Georgia requires married taxpayers with gross incomes over $3,000 to file and pay quarterly estimates. O.C.G.A. § 48-7-114 (1982 & Supp. 1993). Petitioner falls in this classification. (Reich Dep., pp. 22-29). Thus, Petitioner's failure to make his final estimated payment due April 17, 1989 puts him at risk under this statute as well.

The risk of criminal prosecution is present regardless of the intentions of the Commissioner. The only way to avoid this risk is to pay the tax.

O.C.G.A. § 48-2-81 (1991) imposes a duty on law enforcement officials:

> It shall be the duty of all tax collectors, tax commissioners, sheriffs and constables to make sure that all persons violating any tax laws of this state are prosecuted for all such violations.

The Commissioner has repeatedly argued that this risk of criminal prosecution does not count because the taxpayer who has asserted "a reasonable, good faith pre-deprivation challenge" is not subject to criminal prosecu-

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[11] O.C.G.A. § 48-7-2(c) (1982 & Supp. 1993).

(c) *Willful failure to file return or pay estimated tax.*

(1) It shall be unlawful for any person who is required under this article or regulations pursuant to this article to file any return of any tax or pay estimated tax or to keep any record, willfully to fail to file the return or pay the tax or to keep the records at the time or times required by law or regulation.

(2) In addition to any other penalties provided by law, any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor.



tion, and that only an official acting unreasonably or in bad faith would use this threat. *See, e.g.*, Brief in Opposition to Petition for Writ of Certiorari, p. 20. There is no authority in Georgia supporting this proposition urged by the Commissioner. There is no way for a taxpayer to determine if the Commissioner or the State will regard a challenge as "reasonable" or "in good faith." Georgia law provides no guidance.

The Commissioner's "evidence" to support his proposition is that Petitioner and other retirees have not been subjected to prosecution. But Petitioner is in the unique position of having a decision of this Court directly on point stating that the tax he refused to pay was illegal. *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989).

Moreover, in at least one reported Georgia case, *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), a taxpayer with a reasonable, good faith challenge to a tax was threatened with criminal prosecution.

In *Wright*, the taxpayer challenged an occupational tax on constitutional grounds seeking a declaration that the tax was unconstitutional and an injunction against collection of the tax. Between the time suit was filed and the trial, the Commissioner threatened criminal prosecution. To avoid this, the taxpayer paid the tax. The taxpayer in *Wright* recognized that the only way to avoid the risk of criminal prosecution was to pay the tax. Even though the tax was declared unconstitutional and the injunction granted, the taxpayer never received any relief for the illegal taxes collected. *Wright*, 192 Ga. at 867-868, 16 S.E.2d at 875 (1941) (availability of refund statute precludes mandamus); *see also, Eibel v. Forrester*, 194 Ga. 439, 22 S.E.2d 96 (1942) (refund statute not applicable to occupational tax because tax preceded effective date of refund statute).

Thus, the decision of the Commissioner and state prosecutors not to pursue Petitioner and others in the face of

this Court's decision in *Davis* does not remove the risk of prosecution contained in O.C.G.A. §§ 48-7-2 (1982) and 48-7-127(c) (1982 & Supp. 1993). As the taxpayer in *Wright* experienced, it is this risk that creates the duress. *See Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 286 (1912).

The Commissioner has also suggested that under *Cheek v. United States*, 498 U.S. 192 (1991), Col. Reich could not have been prosecuted. Even assuming Georgia would have followed federal cases on this point, from 1978 through 1989, Petitioner could not have been aware of *Cheek* because it had not been decided. During that time, cases such as the Seventh Circuit's decisions in *United States v. Cheek*, 882 F.2d 1263 (7th Cir. 1989) and *United States v. Buckner*, 830 F.2d 102 (7th Cir. 1987), plainly indicated a substantial risk in choosing nonpayment.

For a taxpayer considering a challenge, not paying the contested tax always creates the risk that some prosecutor will pursue criminal prosecution. This is a particularly frightening prospect for retirees living on fixed incomes.

There is no remedy, no procedure, no course of action Petitioner or any taxpayer can take to eliminate the threat posed by these criminal statutes. In Georgia, any taxpayer who does not pay an income tax when due runs the risk of criminal prosecution.

**2. *Financial sanctions.***

In Georgia, any taxpayer who fails to pay income tax is subject to a penalty equal to 25% of the tax, plus interest at the rate of 1% per month. O.C.G.A. §§ 48-7-86 (1982 & Supp. 1993), 48-2-40 (1991). The penalty attaches as soon as the tax is due and is assessed at the rate of ½% per month until the total penalty equals 25% of the tax due. "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid 'under duress' in



the sense that the State has not provided a fair and meaningful deprivation procedure." *McKesson*, 496 U.S. at 38.

Again, there is no requirement of willfulness. Georgia law does provide the Commissioner with discretion to waive the penalty if the failure was due to "reasonable cause," O.C.G.A. § 48-2-43 (1991), and, "no penalty shall be assessed" if the failure is due to "reasonable cause." O.C.G.A. § 48-7-86(a)(2) (1982 & Supp. 1993). But there is no guidance to measure the standard of "reasonable cause."

In any event, "reasonable cause" does not apply in this case. Col. Reich delivered his 1988 return to the Department of Revenue on March 30, 1989 showing his remaining quarterly estimate unpaid.[12] Accompanying the return he delivered a letter stating that he was not paying the estimate, and that he was demanding a refund of all payments previously made "[p]ursuant to the March 28, 1989 holding of the U.S. Supreme Court in *Davis v. State of Michigan.*" (Reich Dep., Ex. 25). On April 12, he filed amended returns for 1980-1988, showing refunds due. (Reich Dep., Ex. 26). Again, he stated that the basis for the refund was *Davis*. Finally, Petitioner filed suit on April 14 for declaratory judgment and injunctive relief based on *Davis*. Despite these actions and *Davis*, on May 16 the Commissioner issued a "Notice of Proposed Assessment" against Petitioner for his final 1988 estimate and the notice sought to assess the statutory penalty and interest. (Reich Dep., Ex. 27) (J.A. 10).

Col. Reich promptly returned the Notice with notations pointing out (1) his March 30, 1989 letter, (2) the filing of his amended returns, and (3) the filing of his

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[12] Georgia's tax return requires the taxpayer to verify the information contained therein "under penalty of perjury." (*See, e.g.*, Reich Dep., Ex. 17). A taxpayer who misstates the information risks felony procedure under O.C.G.A. § 16-10-70 (1992) and is punishable by a fine of not more than $1,000 or prison for 1-10 years or both.

lawsuit all based on *Davis*. (Reich Dep., Ex. 27) (J.A. 10).

Undeterred, the Commissioner issued an "Official Notice of Assessment and Demand for Payment" on June 22, 1989. This assessment increased the interest and penalty from the previous proposed assessment. (Reich Dep., Ex. 29) (J.A. 23).

Col. Reich mounted a bona fide, good faith and reasonable challenge to the disparate tax treatment of federal and state retirees. Two years ago, he won on the basic issue of the illegality of the tax. Still, he faces penalty and interest. Since April 1989, Petitioner has faced 60 months at 1% per month plus the 25% penalty. Thus, he potentially faces an exposure equal to 185% of his final 1988 quarterly estimate, and this number is increasing. Despite three years of litigation, the Commissioner has not withdrawn the penalty and interest sought on Petitioner's assessment. If a taxpayer is subject to the penalty under these circumstances, it is absurd to suggest that the penalty is not real.

3. ***Garnishment and Levy.***

Georgia law further provides that all taxes are personal debts of the person required to file returns. O.C.G.A. § 48-2-55 (1991 & Supp. 1993). Pursuant to this provision, the property of the taxpayer is subject to garnishment and levy if a tax is not paid when due. Under the circumstances of this case, the taxpayer's property is immediately subject to garnishment and levy because no formal assessment is required where the return is accepted by the Commissioner as correct. *State v. Fuller*, 90 Ga. App. 349, 83 S.E.2d 69 (1954). (Assessment is an action taken only with regard to collection of tax exceeding that returned by the taxpayer). Petitioner showed the amount of his final 1988 quarterly estimate due on his return. Even though he simultaneously notified the Commissioner he was not paying it because of *Davis*, the Commissioner has accepted the amount shown as correct.



Georgia law provides no assurance that these collection procedures will be stayed while the legality of a tax is determined. *See, e.g., Gainesville-Hall County Economic Opportunity Org., Inc. v. Blackmon*, 233 Ga. 507, 508, 212 S.E.2d 341, 343 (1975) (acknowledging that an administrative hearing followed by superior court review does not suspend collection procedures).

4. ***Liens.***

Finally, Georgia law provides that the Commissioner may impose a lien on all property of the taxpayer by entering a tax execution on the general execution docket in the county where real property of the taxpayer is located. O.C.G.A. § 48-2-56(e) (1991 & Supp. 1993). Here, the Commissioner has issued an assessment against the Petitioner that has become final according to its terms. Pursuant to O.C.G.A. § 48-2-56 (1991 & Supp. 1993), the Commissioner may record a lien in the general execution docket against all property owned by Petitioner. No procedure proposed by the Georgia Supreme Court automatically prevents the Commissioner from imposing this lien.

**B. The "Remedies" Proposed by the Georgia Supreme Court are Neither Clear Nor Certain.**

1. ***Declaratory Judgment.***

The procedure for a declaratory judgment is not a clear and certain predeprivation remedy because the State is generally immune from declaratory judgment actions based on sovereign immunity. *C.W. Mathews Contracting Co. v. Department of Transp.*, 160 Ga. App. 265, 265, 286 S.E.2d 756, 757 (1981); *Health Facility Inv., Inc. v. Georgia Dep't of Human Resources*, 238 Ga. 383, 385, 233 S.E.2d 351, 353 (1977). The exception to this general rule is a statutory waiver of sovereign immunity. *Busbee v. Georgia Conf., Am. Ass'n of Univ. Professors*, 235 Ga. 752, 758, 221 S.E.2d 437, 442 (1975); *Georgia State Bd. of Dental Examiners v. Daniels*, 137 Ga. App. 706, 707, 224 S.E.2d 820, 821 (1976). A

declaratory challenge to the income tax does not fall within any statutory waiver by the State of its immunity, and such an action would be dismissed for failure to state a claim upon which relief can be granted. *See, e.g., Meadows Motors, Inc. v. Department of Admin. Serv.*, 141 Ga. App. 224, 226, 233 S.E.2d 14, 15-16 (1977).

Indeed, this is precisely what happened to Petitioner's claims for declaratory relief that were filed in April 1989. The trial court noted that the State was immune from suit, that it had consented to suit under the refund statute, but that Col. Reich and his co-plaintiffs had not followed the procedural requirements of that statute. Petitioner's *Davis* based declaratory and equitable claims were therefore dismissed. (J.A. 31).

As the Respondents explained to the trial court in this case, Petitioner's 1989 case and the 1989 *Waldron* case were "dismissed because they were the **wrong types of actions.** They were declaratory judgments as opposed to refund actions brought under our statute." (J.A. 45) (emphasis added).

Additionally, while O.C.G.A. § 9-4-2 (1982) purports to provide for a declaratory judgment even when other remedies are available, Georgia courts have ruled that declaratory relief is not available where other statutory remedies have been specifically provided. *George v. Department of Natural Resources*, 250 Ga. 491, 493, 299 S.E.2d 556, 558 (1983); *see also Benton v. Gwinnett County Bd. of Educ.*, 168 Ga. App. 533, 535, 309 S.S.2d 680, 682 (1983). The declaratory judgment statute was not intended to be applicable to every controversy, since the statute does not take the place of existing remedies. *Mayor and Council of Athens v. Gerdine*, 202 Ga. 197, 42 S.E.2d 567 (1947).

As discussed below, pp. 26-29, Georgia's refund statute purported to provide a clear remedy for taxes "illegally assessed and collected." O.C.G.A. § 48-2-35(a) (1991 & Supp. 1993). Any federal retiree who sought a declaratory judgment ran the risk that the action would be dismissed because of the presence of a specific statutory remedy in the form of the refund statute. In fact, the presence of the refund statute was used to defeat Petitioner's claim for declaratory relief. (J.A. 31). The availability of declartaory relief, then, was not clear and certain.



There are Georgia tax cases that have permitted declaratory judgment claims notwithstanding the availability of defenses based on sovereign immunity and notwithstanding the existence of a specific statutory remedy in the refund statute. None of these cases raise or discuss these defenses. *See, e.g., State v. Private Truck Council of Am., Inc.*, 258 Ga. 531, 371 S.E.2d 378 (1988); *Dekalb County v. Allstate Beer, Inc.*, 229 Ga. 483, 192 S.E.2d 342 (1972). For whatever reason, the defendant (represented by the Attorney General) apparently chose not to assert these defenses. Part of the explanation may lie in the distinguishing fact that these are not income tax cases, and the plaintiffs were not facing the injunction bar in O.C.G.A. § 48-7-84 (1982) (discussed below at pp. 20-23). If an injunction is available against a tax, the taxing authority gains nothing by fighting declaratory relief: the same result can be obtained through a permanent injunction. Whatever the motivations, though, the selective application of these defenses *ipso facto* renders declaratory relief uncertain.

Finally, declaratory relief is not a clear and certain predeprivation remedy for the simple reason that it offers no assurance of a decision before the income tax is due. For Petitioner and most federal retirees, their income taxes are due quarterly. O.C.G.A. § 48-7-114 (1982 & Supp. 1993). The declaratory judgment procedure does not provide an assurance of even a hearing within 90 days of the filing of a complaint, much less a final order. Given the likelihood of an appeal, otbaining a final declaratory judgment before the tax is due is a practical impossibility. In fact, Petitioner filed a suit for declaratory relief in April 1989. (J.A. 5). He did not receive the trial court's order until March 1990 (J.A. 31), and that case ended

then only because Petitioner chose not to appeal. Instead, he initiated this action.

Nor can this problem of delay be solved by an injunction pending the outcome of the declaratory judgment procedure. As discussed below, Georgia law absolutely prohibits any injunction "restraining the assessment or collection" of any income tax. O.C.G.A. § 48-7-84 (1982).

The Georgia Supreme Court erred in holding that declaratory judgment provided Petitioner a clear and certain remedy.

2. ***Equitable relief.***

Equitable relief was not a clear and certain remedy because O.C.G.A. § 48-7-84 (1982) prohibits any injunction restarining the collection or assessment of any income tax:

> No action for the purpose of restraining the assessment or collection of any tax under this chapter [income taxes] shall be maintained in any court.

This statute stands as an absolute bar to enjoining the income tax pending a judicial determination of its illegality.

The Georgia Supreme Court stated in *Reich II* that injunctive relief was, in fact, available, relying on *James B. Beam Distilling Co. v. Georgia II*, 263 Ga. 609, 437 S.E.2d 782 (1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 13, 1994) (No. 93-1140). But *Beam II* was not an income tax case, and the prohibitions against injunctions in this statute did not apply there. If the Georgia court is saying in *Reich II* that this statute somehow does not apply to constitutional challenges, *Reich II* represents the first and only statement of that proposition in Georgia law. Thus, prior to *Reich II*, equitable relief was not clear and certain because it did not exist for income tax cases.

Further, equitable relief is not available in this case because the Georgia Supreme Court has ruled that it is



not available to federal retirees challenging Georgia's income tax on the basis of *Davis*. *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989). In *Collins*, federal retirees filed a class action shortly after *Davis* seeking an injunction requiring the Commissioner to escrow income taxes attributable to federal pensions. On April 14, 1989, the trial court granted this relief. *Collins*, 259 Ga. at 582, 385 S.E.2d at 74. Almost immediately, though, the Georgia Supreme Court issued a supersedeas stay of the injunction on April 19.

By the time the Georgia Supreme Court fully considered the case, the Georgia legislature had amended O.C.G.A. § 48-7-27(a)(4) (Supp. 1993) by eliminating the income tax exemption provided to state employees beginning January 1, 1989. The amendment did not address tax years 1988 and earlier, and it did not address taxes paid for 1988 on or after April 14, 1989. The amendment provided no relief for the illegal taxing in earlier years. Thus, there was a justiciable controversy regarding the illegality of taxes collected after *Davis* was decided on March 28, 1989.[13]

The central issue pending was the propriety of the injunction requiring the Commissioner to "maintain an escrow fund for all payments of income taxes attributable to federal pensions." *Collins*, 259 Ga. at 582, 385 S.E.2d at 74. With regard to this issue, Commissioner argued to the Georgia Supreme Court:

> Code Section 48-2-35 provides a procedure for the refund of taxes erroneously or illegally assessed or collected; this is clearly an adequate remedy at law, within the meaning of the authorities cited above, so

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[13] There is still a justiciable controversy in Georgia regarding the legality of these taxes. The State has retained all taxes collected after *Davis* was decided, and the State has issued assessments to federal retirees who refused to pay 1988 income taxes that were due after *Davis*.

as to preclude the equitable relief ordered by the superior court.

(J.A. 15).

The Georgia Court accepted the Commissioner's arguments and ruled that "the refund statute provides an adequate remedy at law" obviating the need for equitable relief. *Collins*, 259 Ga. at 582 n.1, 385 S.E.2d at 75 n.1. The plaintiffs were not entitled to the injunction they sought.[14]

In the 1989 suit brought by Col. Reich and two other retirees, equitable relief was also denied. In that action, Petitioner asked "[f]or immediate injunctive relief, prohibiting now, and in the future, the State of Georgia from continuing to assess illegal taxes against federal retirees' pensions for 1988 as well as for tax years prior thereto and for tax years hereafter." (J.A. 9).

The trial court dismissed Petitioner's case on the basis of sovereign immunity and because Petitioner had failed to follow the procedural requirements of the refund statute. (J.A. 31).

Thus, not once, but twice, Georgia courts denied equitable relief to federal retirees with *Davis* based claims.

These cases are consistent with prior Georgia law. Georgia courts have long held that equitable relief is precluded if there is an adequate remedy at law, and this proposition is codified in O.C.G.A. § 23-1-4 (1982): "Equity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law[.]" This principle has been applied in tax cases to

[14] The Georgia Court also noted that the record did not indicate that the three named plaintiffs had paid tax after April 14, 1989, suggesting that this was relevant to the decision. The Court is being disingenuous here; *Collins* was filed as a class action, relief was granted as a class action, there was never any dispute that members of the class paid taxes after April 14, 1989, and no inquiry was ever made with regard to when the individual plaintiffs paid their 1988 taxes.



defeat equitable relief.[15] *See, e.g., Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) and *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (both holding that the refund statute was adequate remedy at law to defeat equitable remedy of mandamus for refunds of illegal taxes).

The decision in *Reich I* that the refund statute did not apply was completely unprecedented; the Court cited no authority for its holding, and neither party briefed or argued this issue. The court just made up this holding to reach an end it considered desirable. Before *Reich I*, then, the refund statute provided an adequate remedy at law that precluded equitable relief.

Thus, equitable relief for federal retirees was unclear and uncertain because it was absolutely prohibited under O.C.G.A. § 48-7-84 (1982) and because there was an adequate remedy at law under the refund statute.

### 3. *Administrative Review.*

The *Reich II* majority next claims that there was a predeprivation remedy available under Georgia's Administrative Procedure Act ("APA") (O.C.G.A. § 50-13-12 (1986)).[16] In addition to duress, there are several due process problems with this holding.

[15] As noted at pp. 17-20 above, the Commissioner's decision not to raise this defense in some cases does not make equitable relief a clear and certain remedy in every case.

[16] O.C.G.A. § 50-13-12 (1986). Department of Revenue to hold hearing when demanded by aggrieved taxpayer; election of remedies.

(a) The Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes, or any failure of the department to act in such a matter if the failure is deemed an act under any provision of a tax statute administered by the department, or by any order of the department in such a matter other than an order on a hearing of which the taxpayer was given actual notice or at which the taxpayer appeared as a party.

First, jurisdiction under Georgia's APA to review a tax statute is unclear. The APA allows administrative review to any taxpayer "aggrieved by any act of the department." As the dissent noted in the decision below, though, Petitioner was not aggrieved by an act of the department, but by an unconstitutional act of the legislature. *Reich II*, 263 Ga. at 607, 437 S.E.2d at 323. Jurisdiction is ambiguous at best, and no Georgia decisions provide guidance.

Additionally, jurisdiction under the APA is not triggered until the Revenue Department takes some action. The Department may choose not to issue an assessment or wait to issue an assessment. Meanwhile, the taxpayer remains exposed to criminal prosecution.

In any event, no agency, not even the Department of Revenue, has the authority to strike a tax statute. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975); *see also George v. Department of Natural Resources*, 250 Ga. 491, 299 S.E.2d 556 (1983). Thus, the resort to administrative review would have been completely useless; a taxpayer seeking to void a tax statute as unconstitutional could not obtain that relief under the Administrative Procedure Act. As the Georgia Supreme Court has held, such a challenge would have been "futile at the time of its making." *Flint River Mills*, 234 Ga. at 386, 216 S.E.2d at 897. The availability of a "futile" challenge does not satisfy *McKesson* and *Harper*.

Finally, as with all of the proposed remedies, the risk of sanctions and collection efforts is always present. Even if the taxpayer appeals to superior court under O.C.G.A. § 50-13-19 (1986), that statute expressly provides that the appeal "does not itself stay enforcement of the agency decision." Thus, "[a] taxpayer who chooses [the administrative] remedy . . . is subject to the discretion of the Commissioner and/or reviewing court as to whether collection procedures will be stayed ([citations omitted])." *Gainesville-Hall County Economic Opportunity Org., Inc.*



*v. Blackmon*, 233 Ga. 507, 508, 212 S.E.2d 341, 343 (1975). *See also, Reich II*, 263 Ga. at 607, 437 S.E.2d at 324 (Carley, J., dissenting).

The Commissioner can choose criminal prosecution, financial sanctions, levy, and garnishment while the administrative action is pending. If he chooses to levy on the taxpayer's property, he may even do so without providing notice. *Fowler v. Strickland*, 243 Ga. 30, 252 S.E.2d 459 (1979) (holding that where there is a final assessment in place, Commissioner may levy on taxpayers' bank accounts without notice).

***4. Superior Court Review.***

The Georgia Supreme Court also held that another predeprivation remedy existed in the form of superior court review pursuant to O.C.G.A. § 48-2-59 (1991).[17] This remedy is not certain because it depends entirely on initial action by the Commissioner—issuance of an "order, ruling, or finding." If the Commissioner chooses not to issue an assessment or issue some other order, the taxpayer is precluded from using this procedure. Once a taxpayer chooses not to pay the tax, there is no certainty of an assessment. For example, the Commissioner could chose criminal prosecution under O.C.G.A. § 48-7-2 (1982) without ever issuing an assessment.

In this case, no assessment is required to begin collection efforts because Petitioner returned his final 1988 quarterly estimates as due on the face of his return. Because the Commissioner accepted this amount as correct, this amount became due and payable without assessment. *See State v. Fuller*, 90 Ga. App. 349, 351, 83 S.E.2d 69, 71 (1954) (no assessment proceeding is required

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[17] O.C.G.A. § 48-2-59(a) (1991) provides:

> Except with respect to claims for refunds, either party may appeal from any order, ruling, or finding of the commissioner to the superior court of the county of the residence of the taxpayer[.]

where the return is accepted by the Commissioner as correct).

Thus, the Commissioner could enter an execution on the general execution docket which would impose a lien on all property and rights to property belonging to Petitioner. O.C.G.A. § 48-2-55 (1991 & Supp. 1993). Without the issuance of an assessment, Petitioner could not obtain superior court review under O.C.G.A. § 48-2-59 (1991).[18]

Further, while subjecting the taxpayer to all of the risks discussed above at pp. 11-17, this procedure imposes an additional burden. To obtain jurisdiction in superior court, the taxpayer must post a bond equal to the tax or show real property owned in the State that is valued in excess of the amount of tax in dispute. The surety posting the bond will require a substantial fee and some type of security from the taxpayer, with the result that some real or personal property of the taxpayer will be encumbered pending the outcome of the litigation. A surety bond or other security are immediate and substantial property interests.

**C. Georgia's Refund Statute Provided a Plain Remedy.**

The clear and certain standard of *McKesson* is not met because Georgia, like several other states, has a

[18] Theoretically, Petitioner could seek superior court review of the execution itself by filing an affidavit of illegality under O.C.G.A. § 48-3-1 (1991). But Petitioner would have to know of the execution, and this procedure does not require the Commissioner to give notice. Indeed, the Commissioner may levy on the taxpayer's property without giving notice. *See Fowler v. Strickland*, 243 Ga. 30, 33, 252 S.E.2d 459, 461 (1979). The affidavit of illegality itself does not remove the execution. Finally, this procedure also requires the taxpayer to post a bond or pay the tax. O.C.G.A. § 48-3-1 (1991). This procedure was repeatedly argued in the Georgia Supreme Court by the Respondents. *See* Appellees' Brief on Remand, p. 8; Appellees' Reply Brief on Remand, pp. 18, 20; Appellees' Supplemental Reply Brief, pp. 7-9; Appellees' Post-Argument Supplemental Brief, p. 7. However, given the circumstances referenced above, even the *Reich II* majority was not bold enough to hold that this procedure was clear and certain.



refund statute that provides an unqualified right to refunds of illegal taxes. The clear and certain standard is violated when the State provides a post-deprivation remedy and then eliminates it after the time for other relief has expired. This remedial shell game violates due process. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). *See also, Cambridge State Bank v. James*, No. 10-89-2097, slip op. pp. 11-12 (Minn. Apr. 1994) (1994 WL 106516) (refunds of unconstitutional taxes required by *McKesson*); and *Marx v. Broom*, No. 91-CC-00476, slip op. p. 9 (Miss. Feb. 24, 1991) (1994 WL 52850) (retroactive elimination of refund statute violates due process).

Regardless of the merit of any other remedy, the purported availability of the refund statute made Georgia's entire remedial scheme unclear and uncertain.

At the time *Davis* was decided, it was settled Georgia law that the refund statute provided a remedy for illegal and unconstitutional taxes. *See Parke, Davis & Co. v. Cook*, 198 Ga. 457, 31 S.E.2d 728 (1944) (due process and commerce clause challenges to income tax properly brought under refund statute); *see also, Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972) (constitutional challenge to sales tax dismissed because plaintiffs failed to follow refund statute procedures); *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941) (mandamus denied because refund statute provided adequate remedy at law for constitutional challenge to tax).

In July 1989, in *Collins v. Waldron*, the Respondents here argued that if the tax treatment of federal retirees was invalid:

> [T]he measure of the injury is **plain**—it is the amount of the overpayment—and O.C.G.A. § 48-2-35 provides the legal mechanism for seeking redress.

(J.A. 27) (emphasis added).

In this case, the Respondents told the trial court in October 1991 that other Georgia cases had been "dis-

missed because they were the wrong type of actions. They were declaratory judgments as opposed to refund actions brought under the statute." (J.A. 45).

As discussed above at pp. 20-22, the Georgia Supreme Court ruled in 1989 that the refund statute applied to the very tax at issue here. *Collins v. Waldron*, 259 Ga. at 582 n.1, 385 S.E.2d at 75 n.1 (1989). Until *Reich I* was decided in November 1992, no Georgia court, and certainly not the Revenue Commissioner, had ever suggested that the refund statute was unavailable. The State never pled or argued in this case or any other *Davis* case that the refund statute did not apply.

More recently, Georgia has provided refunds to taxpayers who paid a sales tax on private sales of used vehicles. The tax was declared illegal under Georgia law in *Tedder v. Collins*, Cobb Superior Court, State of Georgia, Civil Action No. 93-1-5530-28 (Order of December 3, 1993). Without waiting for refund claims to be filed, the Governor announced that refunds with interest would be paid. "Miller says he'll refund $34 million from tax on used-vehicle sales," *The Atlanta Constitution*, Dec. 15, 1993, § A at 1.

The taxpayers there received refunds even though the sales taxes were paid under a law "itself subsequently declared to be unconstitutional or otherwise invalid." *Reich v. Collins I*, 262 Ga. 625, 628, 422 S.E.2d 846, 849 (1992). The Attorney General recognized this inconsistency when he wrote to the Governor, "payment in this case could seriously jeopardize our positions in the other pending refund cases." *See* "Bowers opposes refund of vehicle tax fears State would be forced to repay other proceeds," *The Atlanta Constitution*, Dec. 10, 1993, § D at 3 (quoting letters from Attorney General Bowers to the Governor and the Revenue Commissioner).

Both before and after *Reich I*, Georgia has consistently applied the refund statute to unconstitutional and illegal taxes. The rationale in *Reich I*, implicitly affirmed in



*Reich II*, was conjured up solely to defeat the federal rights raised in this case.

The Respondents seek to punish more than 50,000 federal retirees who followed their advice and the "plain" remedy of the refund statute. Prior to *Reich I*, retirees had no notice they were required to take advantage of ambiguous predeprivation procedures to qualify for a refund. They could not have known that by choosing the refund statute, their right to relief would be foreclosed.

Georgia retirees were required to play remedy roulette. The most appropriate and apt remedy was the refund statute because the retiree taxpayer avoided penalties, interest and the risk of criminal prosecution. If retirees placed their bets on the "wrong" remedy, though, they lost their gamble, the illegal tax and any right to relief. The clear and certain mandate of *McKesson* is not met under these circumstances.

## II. "MEANINGFUL BACKWARD LOOKING RELIEF" REQUIRES REFUNDS.

Georgia's failure to provide a clear and certain predeprivation remedy requires the State to provide meaningful backward looking relief. *Harper*, 509 U.S. ——, 113 S. Ct. at 2519, *citing McKesson*, 496 U.S. at 31. Georgia law purports to provide no such relief. In fact, the Georgia Supreme Court has twice considered *Davis* claims under circumstances where it knew that *Davis* applied retroactively, and where it knew that *McKesson* provided the guiding principles of the requirements of due process. Both times, the Georgia court denied all relief. Thus, the question of what are the minimum backward looking requirements of due process in this case is a federal question squarely presented to this Court.

This Court has indicated that "a state may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Harper*, 509 U.S. at —, 113

S. Ct. at 2520, *citing McKesson*, 496 U.S. at 40. In this case, though, because of the passage of time, only full refunds will provide meaningful relief. As this Court noted in *McKesson*, beyond some temporal point, a retroactive tax may violate due process. *McKesson*, 496 U.S. at 40 n.23, *citing Welch v. Henry*, 305 U.S. 134, 147 (1938). Here, a retroactive tax would affect state retirees who paid taxes as long as eight years ago.

Future credits or a future tax exemption for federal retirees will not provide adequate relief because thousands of federal retirees who paid the illegal tax have died. Many others have moved from Georgia. Further, there are many federal retirees now residing in Georgia who never paid the illegal tax but who would stand to benefit from a blanket credit or exemption.

Adequate relief means full refunds for the tax years at issue. The most analogous Georgia cause of action to Petitioner's claims is money had and received, for which there is a four year limitation period. O.C.G.A. § 9-3-25 (1982). Thus, Petitioner and all other federal retirees burdened by the unlawful tax are entitled to refunds, plus interest, of the ilegal taxes paid during this period.

## CONCLUSION

The fundamental force driving this litigation is Georgia's belief that *Davis* was wrongly decided. As the Commissioner recently argued to the Georgia Supreme Court, "four sitting justices on the U.S. Supreme Court itself regard *Davis* either as flatly wrong, or as sufficiently debatable that states with income tax schemes simliar to Michigan's could reasonably have assumed their statutes to be valid." (Appellees' Brief on Remand from U.S. Supreme Court, pp. 14-15). Since the validity of *Davis* is "debatable," it need not be followed, and this premise justifies any action to prevent *Davis* from becoming law in Georgia. Under this view, the State can disregard its



own law, make up new remedies, or issue contradictory decisions as needed to deny enforcement of federal rights.

This approach, though, violates the Supremacy clause and this Court's express holding that, "a state court cannot 'refuse to enforce the right arising from the law of the United States because of conceptions of impolity or want of wisdom.'" *Testa v. Katt*, 330 U.S. 386, 393 (1947). The Georgia Supreme Court has twice denied relief to federal retirees when it knew *Davis* was retroactive and when it knew *McKesson* provided guiding due process principles. Only a mandate of "full refunds to those burdened by the unlawful tax" will insure meaningful relief to federal retirees. *Harper*, 509 U.S. at ——, 113 S. Ct. at 2520.

Respectfully submitted,

CARLTON M. HENSON
*Counsel of Record*
MCALPIN & HENSON
Eleven Piedmont Center
Suite 400
3495 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 239-0774